

STATE OF MICHIGAN
COURT OF APPEALS

KENNETH GREGORY WILSON, as Personal
Representative of the Estate of ORPHA ANNE
WILSON, Deceased, and as Personal
Representative of the Estate of HUGHIE W.
WILSON, JR., Deceased,

Plaintiff-Appellant,

v

THOMAS B. RICHARDSON,

Defendant-Appellee.

UNPUBLISHED
January 12, 2001

No. 216661
Wayne Circuit Court
LC No. 98-827506-NM

Before: Gribbs, P.J., and Kelly and Sawyer, JJ.

KELLY, J. (dissenting)

I respectfully dissent. In my opinion, it was error for the trial court to grant defendant's motion for summary disposition.

When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). This Court is liberal in finding a genuine issue of material fact. *Marlo Beauty Supply, Inc v Farmers Ins Group*, 227 Mich App 309, 320; 575 NW2d 324 (1998). Summary disposition is rarely appropriate in cases involving questions of credibility. *Michigan National Bank-Oakland v Wheeling*, 165 Mich App 738, 744-745; 419 NW2d 746 (1988). The court may not make findings of fact or weigh credibility in deciding a summary disposition motion. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). Thus, when the truth of a material factual assertion depends on credibility, a genuine factual issue exists and summary disposition may not be granted. *Metropolitan Life Ins Co v Reist*, 167 Mich App 112, 121; 421 NW2d 592 (1988).

Here, viewing this matter in a light most favorable to plaintiff, genuine factual issues existed thereby precluding summary disposition. The majority admits that a factual issue existed as to whether plaintiff gave defendant permission to dismiss the underlying medical malpractice claim. The majority also finds, and I concur, that the trial court made an impermissible

credibility determination when it effectively determined that defendant had, in fact, obtained plaintiff's permission to dismiss the medical malpractice action. *Skinner, supra*, 445 Mich 161.

However, the majority concludes that, even if defendant dismissed the lawsuit without permission, plaintiff cannot establish that he would have been successful in the medical malpractice lawsuit. I strongly disagree. Plaintiff presented the report of Dr. Frazier, a cardiologist, to support his contention that he would have been successful in the medical malpractice lawsuit. Dr. Frazier concluded that Orpha's aorta had been dissected. The fact that defendant's experts disagreed merely renders this a credibility contest that must be left to the jury to decide. When the truth of a material factual assertion depends on credibility, a genuine factual issue exists and summary disposition may not be granted. *Metropolitan Life Ins Co, supra*, 167 Mich App 121.

Additionally, discovery was not yet complete in this matter. Therefore, the defendant's motion for summary disposition was premature and should have been denied on that basis as well. *State Treasurer v Sheko*, 218 Mich App 185, 190; 553 NW2d 654 (1996).

I would reverse the trial court's order granting defendant's motion for summary disposition.

/s/ Michael J. Kelly